**IN THE**
**MISSOURI SUPREME COURT**

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| IN RE: | ) | |
| | ) | |
| THOMAS G. BERNDSEN, | ) | No. SC86342 |
| | ) | |
| RESPONDENT. | ) | |

# RESPONDENT THOMAS G. BERNDSEN'S BRIEF


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## INTRODUCTION

The Office of Chief Disciplinary Counsel ("Informant") contends that Thomas G. Berndsen ("Respondent") engaged in conduct prejudicial to the administration of justice in violation of Missouri Rule of Professional Conduct 4-8.4(d). Informant contends that Respondent transmitted by facsimile to opposing counsel a Motion for Protective Order that falsely accused him of attempting to edit portions of a videotaped deposition – a motion that was never filed with the court. Informant also contends for the first time in its brief that Respondent failed to adequately inform the court that the motion had not been filed. Informant contends that these actions prejudiced the administration of justice.

Only two of the members of the hearing panel found Respondent to have violated Rule 4-8.4(d). Professor Kimberly Norwood (Washington University School of Law) filed a separate written dissent finding Respondent's testimony credible and that he did not violate Rule 4-8.4(d) because he never filed the subject motion with the court.

In attorney disciplinary proceedings, Informant must prove its charges of professional misconduct by a preponderance of the evidence. In this case, Informant argues that Respondent's conduct failed to pass a "smell test." Informant is held to a much stricter burden or proof.

Informant has not proven by a preponderance of the evidence (i) that the allegations in Respondent's motion were false; (ii) that Respondent did not have a reasonable basis to prepare and send the motion to opposing counsel; (iii) that Respondent did not inform the court that the motion had not been filed; or (iv) that Respondent's actions prejudiced the underlying custody proceeding. Informant has not

proven by a preponderance of the evidence that Respondent engaged in conduct prejudicial to the administration of justice; therefore, the Information should be dismissed without any discipline being imposed.

## STATEMENT OF FACTS

### A. Introduction

Respondent represented Cynthia McNeill for several years in state and federal court in a protracted and bitterly contested series of lawsuits against William Franke arising out of his intentional violation of their 1998 divorce decree. Respondent was successful in having Mr. Franke held in contempt of court and ordered to pay $2,515,280 to Mrs. McNeill in order to avoid incarceration because he violated their divorce decree. Through executions and garnishments, Respondent collected from Mr. Franke a $695,902.40 judgment due to Mrs. McNeill under their divorce decree. See W.E.F. v. C.J.F., 793 S.W.2d 446, 461 (Mo. App. 1990); Franke v. Franke, 846 S.W.2d 259 (Mo. App. 1993); McNeill v. Community Title Company, 11 S.W.3d 863 (Mo. App. 2000); McNeill v. Franke, 84 F.3d 1010 (8th Cir. 1996); McNeill v. Franke, 171 F.3d 561 (8th Cir. 1999); and Prairie Properties v. McNeill, 996 S.W.2d 635 (Mo. App. 1999). Respondent represented Mrs. McNeill against Mr. Franke opposing his Plan of Reorganization in the bankruptcy cases involving the assets allocated between them in their divorce decree. In re West Pointe Limited Partnership, ED Mo. BR Case No. 90-44-326-172. (See First Amended Joint Plan of Reorganization and Order Confirming Joint Plan, exhibits to Complaint filed by Mr. Osterholt and Mr. Franke, filed separately as a supplement to Informant's record.) In the underlying custody proceeding, Respondent was successful against Mr. Franke in modifying and expanding Mrs. McNeill's custody rights. Compelling evidence exists to show that this complaint is an attempt by Mr.

Franke and Mr. Osterholt to subvert the disciplinary procedures by making an unfounded allegations against their opposing counsel.

In this disciplinary proceeding, Thomas Osterholt and Mr. Franke filed a multi-volume bound complaint against Respondent and his former associates (Mr. Dufour and Mr. Becker) which consisted over one hundred (100) separate allegations, most of which arose out of this other litigation. (App. 4 (Tr. 5-6.)) (See also Complaint filed by Mr. Osterholt and Mr. Franke, filed separately as a supplement to Informant's record.) All but this single allegation have been determined to be baseless.

**B. The Underlying Proceeding**

Underlying this disciplinary proceeding is a child custody modification dispute filed in the Circuit Court of St. Louis County captioned William E. Franke v. Cynthia J. McNeill (formerly Cynthia J. Franke). Respondent represented Ms. McNeill. (App. 7 (Tr. 17.))[1] Thomas Osterholt represented Mr. Franke. (App. 7 (Tr. 16.))

During Mr. Franke's deposition on April 3, 1997, Mr. Osterholt demanded to terminate the deposition by falsely claiming that Mr. Franke's daughter was "missing." (App. 53.) Respondent requested that the matter be discussed off of the record. (App. 54.) Mr. Franke became aggressive and volatile during the deposition and stated:

> Mr. Berndsen, there is one issue right now. Christian is missing. Does [Ms. McNeill] know where [Christian] is? That's the question, forget about all of your legalities and all of your little tricks and manipulations and all your

[1] Unless otherwise noted, Respondent will refer to Informant's Appendix.

little games, there's one question, Christian is missing, where is she? (App. 54.)

After a recess, Mr. Osterholt acknowledged on the deposition record that they already knew the whereabouts of Mr. Franke's daughter. (App. 55, 57-60.) Mr. Osterholt nonetheless terminated the deposition over Respondent's objection. (App. 57-60.)

The day following his deposition, Mr. Franke allegedly requested that Mr. Osterholt contact the company that videotaped the deposition of Mr. Franke. (App. 9 (Tr. 25.)) According to Mr. Osterholt, this was to ensure that the videotape was not altered by the "McNeill side" – i.e., Respondent. (App. 9 (Tr. 25.)) Mr. Osterholt admits that he then contacted Christy O'Brien, the owner of the firm that videotaped the deposition, to discuss under what circumstances the videotape of Mr. Franke's deposition might be altered. (App. 9, 15 (Tr. 25-26, 52.)) He denies requesting that the videotape be altered on their behalf. (App. 9 (Tr. 27.))

Respondent received a telephone call on April 14, 1997 from someone from the court reporting company or video company who cautioned him that Mr. Osterholt had contacted their company about editing the videotape of Mr. Franke's deposition and that he "better do something." (App. 29 (Tr. 107-108.)) In response to this conversation, and only after Mr. Osterholt had already contacted the video company, Respondent prepared a Motion for Protective Order. (App. 29-30 (Tr. 108-09.)) In the Motion for Protective Order, Respondent states that he "has learned that [Mr. Osterholt] has contacted the videotape technician who recorded [Mr. Franke's] deposition and asked to edit portions of the videotape of [Mr. Franke's] deposition." (App. 49-50.) Informant has presented no

evidence whatsoever to refute this fact. Respondent requested a court order prohibiting Mr. Franke from editing his deposition. (App. 49-50.) Since other matters in the case were scheduled for hearing the following day, Respondent scheduled the motion for hearing on April 15, 1997. (App. 29-30 (Tr. 108-09.)) Respondent sent the Motion for Protective Order and Notice of Hearing to Mr. Osterholt by facsimile on the afternoon of April 14, 1997. (App. 30 (Tr. 110.)) Respondent never filed the Motion for Protective Order with the court. (App. 32 (Tr. 117.))

Informant claims that Ms. O'Brien does not recall contacting Respondent following her conversation with Mr. Osterholt. To the contrary, Ms. O'Brien testified that she spoke with Respondent after Mr. Franke's deposition about the potential of editing the videotape. (App. 23-53 (Tr. 83-84, 87-89.)) Ms. O'Brien could not recall if she called Respondent or if Respondent contacted her. (App. 24 (Tr. 87.)) Regardless, she states unequivocally that she had a conversation with Respondent about the potential of editing the videotape of the deposition. (App. 23-25, Tr. 83-84, 87-89.)

Respondent and Mr. Osterholt appeared in court on April 15, 1997. (App. 31 (Tr. 114.)) In the hallway outside of the courtroom, prior to the hearing on the previously scheduled matters, Respondent discussed the Motion for Protective Order with Mr. Osterholt. (App. 31 (Tr. 116.)) Mr. Osterholt informed Respondent that he did not attempt to edit the videotape but had feared that Respondent might attempt to edit the videotape. (App. 31 (Tr. 116.)) Respondent did not believe Mr. Osterholt's explanation. However, based on this conversation, he believed that the risk of alteration of the videotape had passed and informed Mr. Osterholt that he would not file the Motion for

Protective Order with the court or call the motion up for hearing. (App. 31-32 (Tr. 116-17.)) Mr. Osterholt does not recall speaking with Respondent before the hearing. (App. 12 (Tr. 37.))

According to Mr. Osterholt, he wanted to take up the Motion for Protective Order with the court. (App. 8 (Tr. 21.)) Even after Respondent informed him that the Motion would not be filed, Mr. Osterholt insisted that the court take it up because it "[cried] out for testimony." (App. 69.) Respondent immediately informed the court that the motion had not been filed. (App. 69.) Undeterred, Mr. Osterholt called Christy O'Brien, whom he had subpoenaed the day before, to the witness stand to testify. (App. 69-76.) Ms. O'Brien testified that Mr. Osterholt contacted her following the April 3, 1997 deposition and inquired about the circumstances in which the videotape of Mr. Franke's deposition might be altered. (App. 72.) However, Mr. Osterholt never asked Ms. O'Brien the ultimate factual question of whether she had discussed their telephone conversation with Respondent. (App. 70-73.) After Ms. O'Brien testified, Respondent again informed the court that the Motion for Protective Order had not been filed. (App. 76.) The court then stated:

> Under the circumstances, if [the Motion for Protective Order] has not been filed, the Court is not going to make any ruling on it. I'm not going to ask [Respondent] to make any statement about it unless he files it with the Court and it is on record. As far as the Court is concerned, [the Motion for Protective Order] has no probative value. (App 76.)

The Motion for Protective Order was never filed or again brought to the attention of the court. (App. 32 (Tr. 117.)) The child modification proceeding concluded before July 2001. (App. 6 (Tr. 13-14.))

**C. The Disciplinary Proceeding**

Mr. Franke and Mr. Osterholt filed a multi-volume complaint against Respondent in July 2001 which consisted of over one hundred (100) separate charges. (App. 4 (Tr. 5-6.)) (See also Complaint filed by Mr. Osterholt and Mr. Franke, filed separately as a supplement to Informant's record.) Informant found no probable cause of professional misconduct on all but one of their allegations. (App. 95-97.) In regards to the Motion for Protective Order discussed herein, Informant found probable cause to believe that Respondent had violated Rule 4-8.4(d) by engaging in conduct that was prejudicial to the administration of justice. (App 95-96.) Informant filed an Admonition, which Respondent rejected. (App. 4 (Tr. 6.)) Informant then filed an Information alleging that Respondent "prepared a Motion for Protective Order falsely alleging that [Mr. Franke] had attempted to edit portions of a deposition" in violation of Rule 4-8.4(d). (App 95-96.) The Information does not state how transmittal of the Motion for Protective Order to Mr. Osterholt by facsimile prejudiced the administration of justice. (See App. 95-96.) No other Rule of Professional Conduct is alleged to have been violated.

A hearing before a disciplinary hearing panel was held on July 30, 2004. Two of the three panel members concluded that the Motion for Protective Order was prepared by Respondent "for the improper motive of harassment, annoyance, embarrassment, or intimidation of opposing counsel and therefore constituted conduct prejudicial to the

administration of justice" and recommended a public reprimand. (App. 99-104.) The third panel member, Kimberly Norwood, a professor at Washington University School of Law, dissented from the majority's decision and filed a separate written dissent. She found Respondent's testimony to be credible and that he did not violate Rule 4-8.4(d) because he did not file the motion with the court. (App. 106-07.) Respondent did not – and does not - concur with the recommendation of a public reprimand and, therefore, the matter proceeded to this Court pursuant to Rule 5.19(d).

## POINTS RELIED ON

I. Informant's Information should be dismissed and Respondent should not be disciplined, because Informant has not proven by a preponderance of the evidence that Respondent engaged in conduct prejudicial to the administration of justice, in that the Rules of Professional Conduct do not allow an attorney to be disciplined for violating a "smell test."

In re Kazanas, 96 S.W.3d 803 (Mo. banc 2003)

In re Mirabile, 975 S.W.2d 936 (Mo. banc 1998)

In re Voorhees, 739 S.W.2d 178 (Mo. banc 1987)

II. Informant's Information should be dismissed and Respondent should not be disciplined, because Informant has not proven by a preponderance of the evidence that Respondent engaged in conduct prejudicial to the administration of justice, in that Informant has not proven by a preponderance of the evidence that the allegations in Respondent's Motion for Protective Order were false.

Steward v. Goetz, 945 S.W.2d 520 (Mo. App. 1997)

III. Informant's Information should be dismissed and Respondent should not be disciplined, because Informant has not proven by a preponderance of the evidence that Respondent engaged in conduct prejudicial to the administration of justice, in that Informant has not proven by a preponderance of the evidence that Respondent did not have a reasonable basis to prepare the Motion for Protective Order and to send it to opposing counsel by facsimile.

In re Westfall, 808 S.W.2d 829 (Mo. banc. 1991)

In re Waldron, 790 S.W.2d 456 (Mo. banc 1990).

Missouri Rule of Professional Conduct 4-3.1

Missouri Rule of Professional Conduct 4-1.3

IV. Informant's Information should be dismissed and Respondent should not be disciplined, because Informant has not proven by a preponderance of the evidence that Respondent engaged in conduct prejudicial to the administration of justice, in that Informant has not proven by a preponderance of the evidence that preparing the Motion for Protective Order and sending it to opposing counsel by facsimile interfered with the underlying proceeding.

People v. Hotle, 35 P.3d 185 (Colo.O.P.D.J. 1999)

Accurate Construction Company v. Quillen, 809 S.W.2d 437 (Mo. App. 1991).

American Bar Association Model Rule of Professional Conduct 8.4

V. Informant's Information should be dismissed and Respondent should not be disciplined, because the Rules of Professional Conduct have been used by opposing counsel and his client as a procedural weapon, in that opposing counsel and his client filed this complaint in an effort to attack Respondent for his involvement in the underlying proceeding.

Preamble to Missouri Rules of Professional Conduct

## SUMMARY

Informant contends that Respondent violated Rule 4-8.4(d) because he did not have an adequate basis to send the Motion for Protective Order to Thomas Osterholt and because he did not inform the court on April 15, 1997 that the motion had not been filed with the court. Informant contends that these actions prejudiced the administration of justice.

Informant has not proven by a preponderance of the evidence that (i) the allegations in Respondent's motion were false; (ii) Respondent did not have a reasonable basis to prepare and send the motion to opposing counsel; (iii) Respondent did not inform the court that the motion had not been filed; or (iv) Respondent's actions prejudiced the underlying custody proceeding. Therefore, Informant has not proven that Respondent interfered with the administration of justice and the Information should be dismissed and Respondent should not be disciplined.

## STANDARD OF REVIEW

In a disciplinary proceeding, the disciplinary hearing Panel's findings, conclusions, and recommendations are advisory in nature. In re Kazanas, 96 S.W.3d 803, 805 (Mo. banc 2003). This Court reviews the evidence de novo, determines independently the credibility, weight, and value of the testimony of the witnesses, and draws its own conclusions of law. Id. In attorney disciplinary proceedings, the truth of the allegations must be established by a preponderance of the evidence. Id. A charge of professional misconduct does not create a rebuttable presumption of professional misconduct. In re Mirabile, 975 S.W.2d 936, 940 (Mo. banc 1998).

## ARGUMENT

### I. Informant's Information should be dismissed and Respondent should not be disciplined, because Informant has not proven by a preponderance of the evidence that Respondent engaged in conduct prejudicial to the administration of justice, in that the Rules of Professional Conduct do not allow an attorney to be disciplined for violating a "smell test."

Informant's reliance on a "smell test" is incorrect as a matter of law. Attorney discipline is a substantial sanction which must be administered only in accordance with due process of law. In re Voorhees, 739 S.W.2d 178, 180 (Mo. banc 1987). Informant has the burden of proving by a preponderance of the evidence that Respondent's conduct was prejudicial to the administration of justice. In re Kazanas, 96 S.W.3d at 805; In re Mirabile, 975 S.W.2d at 939. Informant's burden is more than a mere "smell test." There is not a single reported decision in Missouri wherein an attorney was disciplined for violating a "smell test." As a matter of law, the Information should be dismissed. At a minimum, Informant's reliance on a "smell test" suggests that neither the facts nor the law support the claim that Respondent violated the Rules of Professional Conduct.

Thomas Osterholt's original complaint stated that Respondent prepared the Motion for Protective Order "to damage his reputation with the judge." (See Complaint filed by Mr. Osterholt and Mr. Franke, filed separately as a supplement to Informant's record.) This allegation proved untrue in that the transcript of the April 15, 1997 hearing unequivocally shows that it was Mr. Osterholt who stated that the matter "[cried] out for testimony" and who insisted on bringing the matter to the court's attention. (App. 69-76).

The transcript shows that Respondent immediately informed the court that the motion had not been filed. (App. 69). The panel abandoned this claim and found that faxing the motion to Mr. Osterholt violated Missouri Rule of Civil Procedure 55.03(b) even though the rule on its face only applies to motions "filed with or submitted to the court." Informant has abandoned this argument and now contends that faxing the Motion to Mr. Osterholt merely violated a "smell test." Such uncertainty of the standard by which Respondent's conduct is to be judged suggests that neither the facts nor the law support the charges against him.

**II. Informant's Information should be dismissed and Respondent should not be disciplined, because Informant has not proven by a preponderance of the evidence that Respondent engaged in conduct prejudicial to the administration of justice, in that Informant has not proven by a preponderance of the evidence that the allegations in Respondent's Motion for Protective Order were false.**

Respondent testified that he was contacted by someone from the court reporting company on April 14, 1997 who warned him that Mr. Osterholt wanted to alter the videotape of Mr. Franke's deposition. (App. 29 (Tr. 107-108.)) This is what Respondent stated in his Motion for Protective Order: "Respondent has learned that [Mr. Franke's] attorney has contacted the videotape technician who recorded [Mr. Franke's] deposition and asked to edit portions of the videotape of [Mr. Franke's] deposition." (App. 49-50.) (Emphasis added.) No evidence in the record of these proceedings refutes this fact. During the hearing on April 15, 1997, after calling her as a witness, Mr. Osterholt never asked Christy O'Brien about what she might have said to Respondent over the telephone on the previous day. (App. 70-73.) Therefore, she never testified as to the ultimate fact of whether Respondent was told over the telephone that Mr. Osterholt had contacted the video technician and asked to edit portions of the videotape of Mr. Franke's deposition. (App. 70-73.) While Respondent made no separate notes of this conversation, the unfiled motion is a contemporaneous record of the telephone conversation. Together with Respondent's testimony, this is the only evidence in the record of what the caller said to

Respondent over the telephone on April 14, 1997 and of what Respondent "learned" about the potential editing of the videotape.

Respondent acknowledges that there is evidence showing that Mr. Osterholt did not ask to edit the videotape. However, this is not the ultimate fact described in the Motion for Protective Order and, therefore, not the ultimate fact by which the veracity of the motion should be judged. The motion did not state that Mr. Osterholt attempted to edit the videotape. (App. 49-50.) It stated that Respondent "learned" that Mr. Osterholt contacted the video technician and asked to edit the videotape. (App. 49-50) This distinction is legitimate and important. In this case, Mr. Osterholt set the entire episode into motion by terminating Mr. Franke's deposition without cause and by contacting the court reporter and essentially accusing Respondent (i.e., the "McNeill side") of wanting to alter the videotape. Having done so, Mr. Osterholt should not object when his own words make their way back to him, especially when Respondent sent the motion to no one else except to Mr. Osterholt.

On the other hand, there is clear evidence that Christy O'Brien did speak to Respondent over the telephone regarding this matter. In her testimony before the hearing Panel, Ms. O'Brien testified that she spoke to Respondent over the telephone on the subject:

> Q. Okay. It's your belief as you sit here today, however, that you did have a conversation with Mr. Berndsen regarding the potential of editing the deposition; is that correct?

A. The potential of editing?

Q. Under what circumstances would the video be edited?

A. Right.

Q. You believe that conversation was with Mr. Berndsen?

A. I believe it was with Mr. Berndsen. (App. 24 (Tr. 87.))

A party is bound by the uncontradicted testimony of its own witnesses, including that elicited on cross-examination. Steward v. Goetz, 945 S.W.2d 520, 528 (Mo. App. 1997). There is no dispute that someone did contact Respondent regarding this issue. There is absolutely no possibility that Respondent could have fabricated the matters stated in the Motion for Protective Order at the same time that Mr. Osterholt admittedly called Ms. O'Brien about the same topic. In her dissent, Professor Norwood found that someone did contact Respondent to advise him that Mr. Osterholt had contacted the videographer about editing the videotape. (App. 106.) Informant has not proven the ultimate fact necessary to sustain the charges against Respondent.

**III. Informant's Information should be dismissed and Respondent should not be disciplined, because Informant has not proven by a preponderance of the evidence that Respondent engaged in conduct prejudicial to the administration of justice, in that Informant has not proven by a preponderance of the evidence that Respondent did not have a reasonable basis to prepare the Motion for Protective Order and to send it to opposing counsel by facsimile.**

The Rules of Professional Conduct do not require an attorney to be absolutely certain of the underlying factual basis of every allegation made in a legal proceeding. The Preamble to Rule 4 provides that "a lawyer's conduct [is judged] on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertainty or incomplete evidence." (Respondent's App. A28-A29.) The attorney's conduct is judged by an objective standard of what a reasonable attorney would have done in the same or similar circumstances. In re Westfall, 808 S.W.2d 829, 841 (Mo. banc. 1991). The Comments to Rule 4-3.1 provide that "[t]he filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because a lawyer expects to develop vital evidence only by discovery." (Respondent's App. A32-A33.)

Respondent had more than a reasonable basis to believe that Thomas Osterholt might have contacted the video technician and asked to edit the videotape on William Franke's behalf. Mr. Osterholt and Mr. Franke's history in the underlying cases showed a

propensity towards such conduct. In his original divorce proceeding, Mr. Franke was sanctioned and fined $50,000 for "frenetically" pursuing baseless allegations that Mrs. McNeill had abused her children. W.E.F. v. C.J.F., 793 S.W.2d 446, 460 (Mo. App. 1990). Mr. Franke also was held in contempt of court for violating their divorce decree and ordered to pay $2,515,280 in restitution to Mrs. McNeill in order to avoid incarceration because he unlawfully released Mrs. McNeill's interest in a "wrap" note and mortgage which had been awarded to her under their divorce decree. See W.E.F. v. C.J.F., 793 S.W.2d 446, 461 (Mo. App. 1990); Franke v. Franke, 846 S.W.2d 259 (Mo. App. 1993); McNeill v Community Title Company, 11 S.W.3d 863, 866 (Mo. App. 2000); and Prairie Properties v. McNeill, 996 S.W.2d 635, 638 (Mo. App. 1999). Mr. Franke proposed a Plan of Reorganization in a related bankruptcy case which would have wiped out Mrs. McNeill's interests in the "wrap" note and mortgage awarded to her in the divorce decree. In re West Pointe Limited Partnership, ED Mo. BR Case No. 90-44-326-172.

Mr. Osterholt interrupted the April 3, 1997 deposition with the frantic claim that Mr. Franke's daughter was missing. (App. 53.) Mr. Osterholt stated:

> On the record. My name is Tom Osterholt, I'm the attorney representing Bill Franke. We're going to have to stop the deposition at this point. Mr. Franke had his daughter, Christin, scheduled to go to a dental appointment, and at this time, and she has not appeared at the dentist appointment, and Mrs. McNeill, do you have any idea where your daughter is Christin. . . .

> The child is missing, and we would like to know if she has any idea. We would like to track her down. (App. 53.)

Mr. Franke became agitated and aggressive towards Respondent:

> Mr. Berndsen, there is one issue right now. Christian is missing. Does [Ms. McNeill] know where [Christian] is? That's the question, forget about all of your legalities and all of your little tricks and manipulations and all your little games, there's one question, Christian is missing, where is she? (App. 54.)

After disrupting the deposition with these allegations, Mr. Osterholt then stated:

> What I wanted was a confirmation to see if our evidence is correct that Mrs. McNeill cancelled the dental appointment, sent someone on Mr. Franke's time to pick the child up, and the child is now at Rosalyn Schultz? Is that the case? Is that where she's at? (App. 55.)

The deposition transcript unequivocally shows that at the time he interrupted and then terminated Mr. Franke's deposition, Mr. Osterholt <u>already knew</u> exactly where the child was and shows that his claim that she was "missing" was not true. Mr. Osterholt's own words show that he was trying to lay a trap for Respondent and for Mrs. McNeill by trying to induce them to deny knowledge of the child's whereabouts. Respondent urges the Court to view the videotape of the conclusion of Mr. Franke's deposition to see for itself the vehement animosity directed toward Respondent by both Mr. Osterholt and Mr. Franke.

Ms. O'Brien testified that the personnel from her office who were involved with Mr. Franke's deposition on April 3, 1997 concurred that Mr. Franke was "extremely badly behaved during the deposition." (App. 22 (Tr. 77-78.)) Under the circumstances, Respondent had more than a reasonable basis to believe that, after reflecting on their behavior, Mr. Osterholt and Mr. Franke would not have wanted their actions caught on camera and that Mr. Osterholt may very well have contacted the videographer about editing the videotape. Moreover, Respondent did in fact make a reasonable inquiry as to the allegations in his Motion for Protective Order. He questioned the person from the court reporting company who contacted him by telephone and evaluated his or her warning in light of Mr. Franke and Mr. Osterholt's past conduct. (App. 29 (Tr. 107-108.))

Rule 4-1.3 also provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." The Comments to Rule 4-1.3 provide that:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. (Respondent's App. A31-A32.)

Under the circumstances, Respondent had a reasonable, good faith belief that the videotape of Mr. Franke's deposition might be altered and he had a duty to try to protect his client's interests. Likewise, Respondent had a duty to the court to try to prevent

conduct which he believed, in good faith, would have been prejudicial to the administration of justice.

Informant asks the Court to accept the panel's conclusion that Respondent's "testimony concerning the April 14, 1997 telephone call lacks all credibility" because he did not remember the caller's identity. (App. 102.) Informant overlooks several factors which make it entirely plausible for Respondent to lack a clear memory of the caller's identity. First, Mr. Osterholt waited over four years to file his complaint. The hearing Panel did not convene until seven years after the events occurred. Respondent should not be faulted for not remembering the caller's identity after this much time had elapsed. Second, no evidence refutes Respondent's testimony as to what was said to him over the telephone on April 14, 1997. Third, the panel appears to have disregarded Christy O'Brien's testimony that she had a conversation with Respondent about the possibility of editing the videotape of Mr. Franke's deposition. (App. 23-25 (Tr. 83-84, 87-89.)) Ms. O'Brien was called as a witness by the Informant and her credibility has never been questioned. A party is bound by the uncontradicted testimony of its own witnesses, including that elicited on cross-examination. Goetz, 945 S.W.2d at 528. Fourth, it is impossible for Respondent to have coincidentally prepared a motion concerning the potential editing of the videotape of Mr. Franke's deposition at the same time that Mr. Osterholt contacted Ms. O'Brien and inquired about the same topic. In her dissent, Professor Norwood specifically found that this telephone conversation must have occurred. The repudiation of Respondent's credibility as to the occurrence of this telephone call defies reason.

Respondent respectfully suggests that if this case comes down to an assessment of his credibility versus Mr. Osterholt's credibility, the Information should be dismissed. Neither Mr. Osterholt's claims nor his testimony have any credibility whatsoever. For example, he interrupted and terminated Mr. Franke's deposition by claiming that Mr. Franke's daughter was "missing" when in fact he already knew her whereabouts. (App. 53.) He deliberately made an accusation on the record in a deposition that was not true. Moreover, he did so in an apparent attempt to lay a trap for Respondent and his client. Mr. Osterholt stated in his initial complaint that Respondent prepared the Motion for Protective Order in order to "damage his reputation with the judge." (See Complaint filed by Mr. Osterholt and Mr. Franke, filed separately as a supplement to Informant's record.) This claim proved to be false in that the transcript of the April 15, 1997 hearing plainly shows that it was Mr. Osterholt himself who insisted that the matter "[cried] out for testimony" and who insisted that the matter be brought to the court's attention. (App. 69). The transcript shows that before any testimony was taken and in response to Mr. Osterholt's opening comments, Respondent immediately informed the court that the motion had not been filed. (App. 69.) Mr. Osterholt must have known full well that Respondent could not have intended to damage his reputation with the judge if the motion was never filed with the court. Mr. Osterholt must have known full well that the matter would have never been brought to the court's attention absent his own actions. The fact that Mr. Osterholt called Christy O'Brien to testify at the hearing on April 15, 1997 but never asked her what she might have said to Respondent over the telephone on the preceding day smacks of contrivance.

In his sworn affidavit, Mr. Osterholt alleges that he had no idea that the Motion for Protective Order had not been filed with the court and alleges that Respondent did not inform him that it had not been filed until after Ms. O'Brien had already testified. (Respondent's App. A3.) The transcript of the April 15, 1997 hearing refutes this sworn statement and shows that Respondent informed the court that the motion had not been filed as soon as Mr. Osterholt raised the issue and before he went forward with any testimony (App. 69). The allegations in Mr. Osterholt's affidavit are false. The panel apparently accepted Mr. Osterholt's explanation that these misstatements were merely honest mistakes attributed to the fact that he did not yet have the benefit of a transcript of the hearing. Mr. Osterholt is forgiven for filing a false affidavit while Respondent's credibility is questioned for not remembering the name of a person whom he spoke to over the telephone for just a few minutes many years earlier. Moreover, Mr. Osterholt is afforded the privilege of bringing a disciplinary complaint against Respondent before verifying the facts of his complaint, but Respondent is held to the burden of complete accuracy before faxing a motion to Mr. Osterholt which was never filed with the court and which was never seen by anyone else. The court should not adopt such a one-side standard of credibility. A lack of veracity with respect to any aspect of his complaint taints Mr. Osterholt's credibility as to the entire proceeding. In re Waldron, 790 S.W.2d 456, 461 (Mo. banc 1990).

Informant faults Respondent for not contacting Mr. Osterholt before faxing the Motion for Protective Order to him. This criticism is misplaced for several reasons. As Professor Norwood points out in her dissent, it is unlikely that it would have had any

impact on Mr. Osterholt's reaction – as evidenced by his subsequent conduct in insisting that the court hear the matter even after it was clear that the motion had not been filed and would not be brought to the court's attention. (App. 106-07.) Respondent spoke to Mr. Osterholt in the hallway on the day of the hearing and elected not to file the Motion for Protective Order and thereby complied with Rule 55.03(b).

Equally important is the context of Respondent's actions. This entire episode was set into motion by Mr. Osterholt. He terminated Mr. Franke's deposition for reasons he knew to be untrue. (App. 53.) He contacted the court reporter and essentially accused Respondent (i.e., the "McNeill side") of trying to edit the videotape. (App. 9 (Tr. 25.)) Mr. Osterholt called a professional within the legal community with whom Respondent would undoubtedly have other business and disparaged his reputation by suggesting that he might want to edit a deposition videotape, whereas Respondent merely faxed a motion to Mr. Osterholt in private which no one else ever saw. The entire episode was set into motion by Mr. Osterholt and he should not be allowed to object to the reasonable, and entirely foreseeable, reactions resulting from his own conduct. He could have recognized his own role in the matter and telephoned Respondent when he received the facsimile on April 14, 1997 and told him that he had indeed contacted the court reporter but that he did not try to edit the videotape, and thereby avoided the ensuing confrontation.

**IV. Informant's Information should be dismissed and Respondent should not be disciplined, because Informant has not proven by a preponderance of the evidence that Respondent engaged in conduct prejudicial to the administration of justice, in that Informant has not proven by a preponderance of the evidence that preparing the Motion for Protective Order and sending it to opposing counsel by facsimile interfered with the underlying proceeding.**

To prove interference with the administration of justice, Informant has the burden of proving by a preponderance of the evidence that Respondent's conduct prejudiced the underlying proceeding. In re Kazanas, 96 S.W.3d at 805. To meet this burden, Informant must prove "some nexus between the conduct charged and an adverse effect upon the administration of justice." People v. Hotle, 35 P.3d 185, 190 (Colo.O.P.D.J. 1999). In Hotle, an attorney abandoned a client who he had agreed to represent in a criminal matter. Id. at 188. The Office of the Presiding Disciplinary Judge of the Supreme Court of Colorado dismissed the charge that the attorney prejudiced the administration of justice because no evidence was presented suggesting that the attorney's misconduct, although related to a pending court proceeding, prejudicially affected, delayed, interfered with, or altered the course of that proceeding or, directly or indirectly, affected the administration of justice. Id. at 190.

In this case, neither the panel nor Informant have cited any evidence showing how Respondent's actions prejudiced, delayed, interfered with, or altered the course of the underlying custody proceeding. After discussing the matter with Mr. Osterholt on the

morning of April 15, 1997, Respondent decided not to proceed further with the motion. (App. 31-32 (Tr. 116-17.)) In was Mr. Osterholt who stated that the matter "[cried] out for testimony" and who insisted on bringing the matter to the court's attention. (App. 69.) Even when Mr. Osterholt demanded that Respondent take the stand to testify at the hearing, Respondent declined to do so. (App. 75-76.) Moreover, the court ruled that the Motion for Protective Order had "no probative value" and declined Mr. Osterholt's outlandish demand that Respondent testify. (App. 76.). Without proof by a preponderance of evidence that Respondent's actions interfered with the underlying custody proceedings, Respondent can not be found to have prejudiced the administration of justice in violation of Rule 4-8.4(d).

Even if Informant's allegations were true, Respondent's actions do not rise to the level of an interference with the administration of justices as contemplated by or as proscribed by Rule 4-8.4(d). Rule 4-8.4(d) is taken verbatim from American Bar Association Model Rule of Professional Conduct 8.4. The annotations to Model Rule 8.4 discuss in detail the types of conduct deemed prejudicial to the administration of justice (Respondent's App. A20-A25.). The types of conduct encompassed by Model Rule 8.4 include rude, abusive, disruptive, or other uncivil behavior, i.e., disrespect for the court and abusive or uncivil behavior towards opposing counsel or parties. See In re Jaques, 972 F.Supp. 1070 (E.D. Tex. 1997) (lawyer assaulted opposing counsel in courtroom during trial recess, engaged in abusive and disruptive behavior during his own deposition, and defrauded one of his clients); People v. Nelson, 941 P.2d 922 (Colo. 1997) (lawyer shoved another lawyer in courtroom); Florida Bar v. Martocci, 791 So.2d 1074 (Fla.

2001) (lawyer made disparaging and profane remarks to humiliate opposing party and counsel in divorce proceedings); Florida Bar v. Sayler, 721 So.2d 1152 (Fla. 1998) (lawyer sent threatening letter to opposing counsel). In Matter of Hinds, 449 A.2d 483, 498 (N.J. 1982), the New Jersey Supreme Court stated that when the rule barring conduct prejudicial to the administration of justice serves as the sole basis for discipline, it should be applied only in situations involving conduct "flagrantly violative of accepted professional norms." In In re Complaint of Thompson, 940 P.2d 512, 516 (Or. 1997), the Oregon Supreme Court interpreted the word "prejudice" to require either repeated conduct causing some harm to the administration of justice, or a single act causing substantial harm to the administration of justice. In this case, Respondent's actions do not rise to the level of rude, abusive, disruptive, or uncivil behavior as cited by these authorities.

Another type of conduct deemed prejudicial to the administration of justice is conduct involving dishonesty. See In re Mason, 736 A.2d 1019 (D.C. 1999) (lawyer lied under oath to Federal Home Loan Bank Board in course of agency investigation); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lane, 642 N.W.2d 296 (Iowa 2002) (lawyer submitted brief plagiarized from legal treatise, then applied to court for $16,000 in legal fees for time spent on brief, claiming it took eighty hours to write); Kentucky Bar Ass'n v. Jacob, 950 S.W.2d 832 (Ky. 1997) (lawyer knowingly lied to court by making false statement in interrogatory regarding insurance coverage of car driven by daughter). In this case, Informant does not claim that Respondent sought to deceive the court as

evidenced by the fact that Informant has not charged him with a violation of Rule 4-8.4(c), which bars conduct involving dishonesty, fraud, deceit, or misrepresentation.[2]

Informant contends that the mere transmittal of the Motion for Protective Order to Mr. Osterholt prejudiced the administration of justice. Informant has not proven by a preponderance of the evidence a nexus between this purported act of misconduct and an adverse effect upon the underlying proceeding or a substantial harm to the administration of justice. Hotle, 35 P.3d at 190. Informant has not shown that this act was flagrantly violative of accepted professional norms. Matter of Hinds, 449 A.2d at 498. Informant has not shown that Respondent engaged in a pattern of repeated conduct or a single action causing substantial harm to the underlying custody action. In re Complaint of Thompson, 940 P.2d at 516. Again, it was Mr. Osterholt who brought the matter before the court. There was no nexus between Respondent's actions and the disruption of the underlying proceedings and, therefore, no violation of Rule 4-8.4(d).

Similarly, holding that Respondent violated Rule 55.03(b) of the Rules of Civil Procedure by merely faxing the unfiled Motion for Protective Order to Mr. Osterholt and that Respondent thereby violated Rule 4-8.4(d) is contrary to the plain text of both rules. On its face, Rule 55.03(b) only applies to motions which are "filed with or submitted to

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[2] The other types of conduct deemed prejudicial to the administration of justice include lack of competence or diligence, improper influence, and exhibition of an improper bias or prejudice. (Respondent's App. A20-A25.) None of these are applicable in this proceeding.

the court." (Respondent's App. A 37.) The Motion for Protective Order was never filed or submitted to the court. It is wholly inconsistent with the rule to conclude that Rule 55.03(b) applies to papers which are not filed with the court. Moreover, before filing the motion with the court, Respondent spoke with Mr. Osterholt in the hallway outside of the courtroom on the morning of the hearing on April 15, 1997. (App. 31-32 (Tr. 116-17.)) After hearing Mr. Osterholt's explanation, Respondent elected not to file the motion with the court, despite doubts regarding Mr. Osterholt's explanation. Rule 55.03 requires that a reasonable prefiling inquiry be conducted into the law and facts. Accurate Construction Company v. Quillen, 809 S.W.2d 437, 444 (Mo. App. 1991). Therefore, even assuming for purposes of argument that all of Informant's allegations are true, Respondent fully complied with the spirit and letter of Rule 55.03(b) by inquiring of Mr. Osterholt before the motion was filed.

In a disciplinary proceeding, an attorney's conduct must be judged objectively. In re Westfall, 808 S.W.2d at 837. If the Rules of Civil Procedure establish an objective standard of conduct by requiring an investigation before filing a motion with the court, an attorney who complies with those Rules should not be then subject to an additional or heightened standard of conduct for what he does before filing the motion or merely in contemplation of the filing, especially not to a standard which is both undefined and completely subjective (i.e., a "smell test").

Informant also contends that Respondent prejudiced the administration of justice by "standing mute" while Mr. Osterholt questioned Christy O'Brien and while he testified during the April 15, 1997 hearing, or by somehow not more forcibly informing

the court that the Motion for Protective Order had not been filed. To the contrary, Respondent immediately informed the court that the Motion for Protective Order had not been filed as soon as Mr. Osterholt brought the matter up with the court and again when Mr. Osterholt demanded that he testify. (App. 69, 76.) The court recognized that the Motion for Protective Order had not been filed and specifically ruled that he would not compel Respondent to testify on an issue which had "no probative value." (App. 76.) Informant does not specify what further or different action Respondent should have or could have taken in response to Mr. Osterholt's conduct. Certainly, declining to be more disruptive in the courtroom is not an interference with the administration of justice.

Regardless, the notion that Respondent should be disciplined for not doing more to stop Mr. Osterholt is misplaced. Respondent informed the court and Mr. Osterholt in advance of any testimony that the motion had not been filed and would not be heard. (App. 69.) It was Mr. Osterholt who wasted the court's time by making a spectacle of a moot issue which otherwise would have been dropped. It was Mr. Osterholt's actions which delayed and hindered the underlying proceeding, not Respondent's.

"Standing mute" does not under any applicable standard amount an interference with the administration of justice. Without proof by a preponderance of the evidence that Respondent prejudiced the underlying custody proceeding, Respondent can not be found to have violated Rule 4-8.4(d).

The panel also found that Respondent's Motion for Protective Order was prepared for the improper motive of harassment, annoyance, embarrassment, or intimidation of Mr. Osterholt and therefore constituted conduct prejudicial to the administration of

justice (App. 103.) There is no proof to support this conclusion. There is no causal connection between Respondent's actions and this conclusion. There is no evidence of Respondent's motives anywhere in the record of these proceedings, except for his testimony that he felt compelled to protect his client's interests (App. 30 (Tr. 112.)) No legal basis exists to make such an inference. An inference is not allowed where there is only a possibility that one event could have happened because of another. A court can not supply missing evidence or give the proponent the benefit of unreasonable, speculative, or forced inferences. The evidence and inferences must establish every element of the proponent's claim and can not leave any issue to speculation. A submissible case is not made if it solely depends on evidence which equally supports two inconsistent and contradictory inferences constituting an ultimate or determinative fact, because liability is then left in the realm of speculation, conjecture, and surmise. Steward v. Baywood Villages Condominium Ass'n, 134 S.W.3d 679, 682 (Mo. App. 2004); Steward v. Goetz, 945 S.W.2d 520, 528-29 (Mo. App. 1997).

In this case, the panel's inference that Respondent intended to harass and embarrass Mr. Osterholt imposes liability by speculation, conjecture, and surmise. There are several other more plausible explanations for Respondent to have prepared and faxed the Motion for Protective Order to Mr. Osterholt. First, the hearing Panel could have accepted Respondent's explanation that he felt compelled to protect his client's interests. Alternatively, Respondent may have misunderstood what the caller had said to him over the telephone on April 14, 1997. Likewise, the caller could have misunderstood what Mr. Osterholt had said to her. The caller could have been someone else other than Christy

O'Brien – such as another person from her office who might have overheard her conversation with Mr. Osterholt.

Mr. Osterholt's other actions are compelling evidence that Respondent's testimony was truthful and that Mr. Osterholt's was not; such as trying to snare Mrs. McNeill or Respondent in a trap during Mr. Franke's deposition (App. 53); such as insisting on making a record before the court when he knew that the Motion for Protective Order had not been filed (App. 69-76); such as not asking Christy O'Brien on the witness stand what she said to Respondent over the telephone (App. 69-73); such as misstating the facts in his sworn affidavit (Respondent's App. A3); and such as taking the court reporters' depositions when they had no relevance whatsoever to the pending custody case. Under all of the circumstances, there is no basis to infer that Respondent's actions were motivated by a desire to harass or embarrass Mr. Osterholt.

Moreover, Respondent's motives are not an issue in determining whether he interfered with the administration of justice.[3] In interpreting its rule barring conduct prejudicial to the administration of justice, the Oregon Supreme court has held that the rule "focuses on the effect of the lawyer's conduct, not on the lawyer's intent." In re Conduct of Stauffer, 956 P.2d 967, 976 (Or. 1998). Therefore, since Respondent's action

[3] No Missouri appellate decision interprets Rule 4-8.4(d). However, the rule is taken verbatim from American Bar Association Model Rule of Professional Conduct 8.4(d). (Respondent's App. A9-A27.) Therefore, the Court should look to other states that have adopted and interpreted the same rule.

did not impact the underlying custody proceeding, his supposed motives are irrelevant and should not serve as a basis for discipline.

**V. Informant's Information should be dismissed and Respondent should not be disciplined, because the Rules of Professional Conduct have been used by opposing counsel and his client as a procedural weapon, in that opposing counsel and his client filed this complaint in an effort to attack Respondent for his involvement in the underlying proceeding.**

The Preamble to Rule 4 provide that the disciplinary procedures are "subverted when they are invoked by opposing parties as procedural weapons." (Respondent's App. A28-A29.) In addition to the underlying custody case, Respondent represented Mrs. McNeill in state and federal court in a protracted and bitterly contested series of lawsuits against Mr. Franke arising out of his intentional violation of their 1988 divorce decree. Respondent was successful in having Mr. Franke held in contempt of court and ordered to pay $2,515,280 to Mrs. McNeill in order to avoid incarceration because he violated their divorce decree. Through executions and garnishments, Respondent collected from Mr. Franke a $695,902.40 judgment due to Mrs. McNeill under their divorce decree. See W.E.F. v. C.J.F., 793 S.W.2d 446, 461 (Mo. App. 1990), Franke v. Franke, 846 S.W.2d 259 (Mo. App. 1993), McNeill v. Community Title Company, 11 S.W.3d 863 (Mo. App. 2000), McNeill v. Franke, 84 F.3d 1010 (8th Cir. 1996), McNeill v. Franke, 171 F.3d 561 (8th Cir. 1999), and Prairie Properties v. McNeill, 996 S.W.2d 635 (Mo. App. 1999). Respondent represented Mrs. McNeill against Mr. Franke opposing his Plan of Reorganization in the bankruptcy cases involving the assets allocated between them in their divorce decree. In re West Pointe Limited Partnership, ED Mo. BR Case No. 90-44-326-172. (See First Amended Joint Plan of Reorganization and Order Confirming Joint

Plan, exhibits to Complaint filed by Mr. Osterholt and Mr. Franke, filed separately as a supplement to Informant's record.) In the underlying custody proceeding, Respondent was successful against Mr. Franke in modifying and expanding Mrs. McNeill's custody rights.

Compelling evidence exists to show that this complaint is an attempt by Mr. Franke and Mr. Osterholt to subvert the disciplinary procedures through a vindictive final salvo against the opposing counsel who beat them in court. Mr. Osterholt and Mr. Franke filed a multi-volume bound complaint against Respondent and his former associates (Mr. Dufour and Mr. Becker) which consisted over one hundred (100) separate allegations, most of which arose out of this other litigation. (App. 4 (Tr. 5-6.)) (See also Complaint filed by Mr. Osterholt and Mr. Franke, filed separately as a supplement to Informant's record.) The amount of time and money which was obviously devoted to their effort must have been staggering. All but this single allegation have been determined to be baseless and have been dismissed. (App. 95-97.) Mr. Osterholt waited over four years to file his complaint. After the court refused to hear the matter on April 15, 1997, Mr. Osterholt and Mr. Franke were not satisfied to let the matter drop. In July, 1997, they deposed Mr. Bradford Smith, the video technician who actually video taped Mr. Franke's April 3, 1997 deposition and Ms. Kelly Willis, the court reporter who stenographically recorded the deposition. (See Complaint filed by Mr. Osterholt and Mr. Franke, filed separately as a supplement to Informant's record.) These depositions had no connection whatsoever with the merits of the underlying custody proceeding. They were taken for no other purpose that to lay the ground work for this complaint against Respondent. (Thus, Mr.

Osterholt and Mr. Franke thereby improperly used the subpoena power of the circuit court to compel deposition testimony of third-party witnesses for a completely collateral purpose unrelated to the underlying custody case.)

Mr. Franke did not stop with Respondent. He also sued the psychologist whom Respondent and Mrs. McNeill used as an expert witness to testify against him in the custody case William E. Franke v. Rosalyn Schultz, St. Louis County, Missouri, Circuit Court Case No. 99CC-001358.

This complaint is just one aspect of a calculated and retaliatory attack by Mr. Franke and Mr. Osterholt against Respondent. Mr. Franke has the financial wherewithal and proclivity to strike out against everyone who opposes him. It has been almost fifteen years since Respondent's representation of Mrs. McNeill began. Mr. Franke's desire, after so many years, to pursue these complaints against his former wife's attorneys speaks volumes of his intentions. This court should not allow Mr. Osterholt or Mr. Franke to subverts the disciplinary process by using it to extract revenge against their opposing counsel.

## CONCLUSION

Respondent is guilty of no more than faithfully representing his client well within the bounds of the law against what he reasonably and in good faith believed to be an attempt by opposing counsel to alter the videotape of a deposition which would have been embarrassing to him and his client.

Rule 4-8.4(d) prohibits conduct deemed prejudicial to the administration of justice. Informant has not proven by a preponderance of the evidence that (i) the allegations in Respondent's motion were false; (ii) that Respondent did not have a reasonable basis to prepare and send the motion to opposing counsel; (iii) that Respondent did not inform the court that the motion had not been filed; or that (iv) Respondent's actions prejudiced the underlying custody proceeding. Therefore, Informant has not shown that Respondent interfered with the administration of justice and the Information should be dismissed and Respondent should not be disciplined.

Respectfully submitted,

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## AFFIDAVIT OF SERVICE

The undersigned certifies that on the 30th day of December, 2004, two copies of respondent's brief and one computer disk containing the same were placed in the United States Mail, postage prepaid, to: Sharon K. Weedin, Office of Chief Disciplinary Counsel, 3335 American Avenue, Jefferson City, Missouri 65109.

_____

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that respondent's brief complies with the limitations of Missouri Rule of Civil Procedure 84.06(b), contains approximately 8,533 words, and that the computer disk filed with Respondent's Brief under Rule 84.06 has been scanned for viruses and is virus-free.

_____

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